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Boulevard Plaza Sdn Bhd (receiver and manager appointed) v Gas District Cooling (Putrajaya) Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-24NCC-31–01 OF 2018
MOHAMED ZAINI MAZLAN J
24 OCTOBER 2018

C

Companies and Corporations — Companies Act 2016 — s 392 — Applicability of s 392(6) and (7) of the Companies Act 2016 — Plaintiff's receiver and manager sought for declaration to compel defendant to continue supplying chilled water to plaintiff's building during receivership — Whether s 392(6) and (7) of the Companies Act 2016 applied to chilled water — Whether chilled water fell under category of 'supplies' — Whether there was compromised agreement between parties — Whether compromised agreement breached by defendant when it issued notice of termination

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Via an agreement dated 14 March 2014 ('the agreement'), the defendant had agreed to supply chilled water to the plaintiff's building. On 16 November 2017, Mr Duar Tuan Kiat was appointed as the receiver and manager of the plaintiff's building. Problem arose when the plaintiff failed to pay the services rendered by the defendant amounting to RM4,171,523.35. The plaintiff claimed that, in a meeting between the representatives of the plaintiff's receiver and manager and the defendant on 4 January 2018, it was agreed that the defendant would continue supplying chilled water to the building, based on the assurances from the receiver and manager that it would pay the charges incurred during the receivership period, and submit a proposal for the arrears incurred pre-receivership by the 26 January 2018. To substantiate its version, the plaintiff had produced its own internal memorandum. On the other hand, the defendant denied making any such representation during the meeting and maintained that it had required the plaintiff to immediately submit a proposal for payment of the arrears for its consideration, in order to consider whether to continue supplying chilled water to the building. As the defendant did not receive any immediate proposal, the defendant had issued its notice of termination to the plaintiff. In the present case, the plaintiff had filed originating summons and injunction and the plaintiff basically sought for a declaration that would in essence compel the defendant to continue supplying chilled water to the plaintiff's building during the period of receivership. The issues for consideration were: (a) whether chilled water came under s 392(6) and (7) of the Companies Act 2016 ('the CA 2016'); (b) whether there was a compromised agreement between the parties; and (c) if there was a

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compromised agreement, whether it had been breached by the defendant when it issued the notice of termination.

Held, dismissing the plaintiff's application for an injunction and originating summons with costs of RM7,000 and RM5,000 respectively:

(1) The words in s 392(6) and (7) of the CA 2016 were clear, in that the only supplies concerned were water, electricity, gas and telecommunication. Section 392(6) and (7) of the CA 2016 was not drafted to allow the list of supplies stated as non-exhaustive. These sections ought to be given its plain meaning (see para 55).

(2) The court had emphasised the phrase 'utilities' as opposed to 'essential services' as favoured by the plaintiff, as water, electricity, gas and telecommunication were utilities, in fact, public utilities. Utilities, by its common understanding, were products that were for public consumption, which arguably were products that the public could not live without. They were crucial for any corporation to carry out their daily operations. Chilled water, unlike electricity, was not for public consumption at large. The court was not inclined to add chilled water to the list of supplies under s 392(6) of the CA 2016. The court was of the view that s 392(6) and (7) of the CA 2016 governed public utilities, and that it did not include chilled water. The defendant was well within its rights to rely on the provisions in the agreement to terminate the supply of chilled water, for non-payment of the arrears incurred by the plaintiff (see paras 42, 45–46 & 58).

(3) Unless there were compelling evidences to substantiate, or a lack of denial from the other party, an allegation made in an affidavit remained unproven. The internal memorandum was self-serving and did nothing to add weight to the plaintiff's version. In fact, the correspondence between the parties post-meeting served to support the defendant's contention. The court therefore was unable to accept the plaintiff's version (see para 60).

[Bahasa Malaysia summary

Melalui perjanjian bertarikh 14 Mac 2014 ('perjanjian tersebut'), defendan telah bersetuju untuk membekal air sejuk kepada bangunan plaintif. Pada 16 November 2017, Encik Duar Tuan Kiat telah dilantik sebagai penerima dan pengurus bangunan plaintif. Masalah timbul apabila plaintif gagal membayar untuk perkhidmatan yang diberikan oleh defendan berjumlah RM4,171,523.35. Plaintif mendakwa bahawa, dalam satu mesyuarat antara wakil penerima dan pengurus plaintif dan defendan pada 4 Januari 2018, ia telah dipersetujui bahawa defendan boleh meneruskan membekalkan air sejuk kepada bangunan itu, berdasarkan jaminan daripada penerima dan pengurus itu bahawa ia akan membayar caj yang ditanggung sepanjang tempoh

penerimaan itu, dan mengemukakan cadangan untuk tunggakan yang ditanggung penerimaan sebelum 26 Januari 2018. Bagi mengukuhkan versinya, plaintif telah mengemukakan memorandum dalamannya sendiri. Sebaliknya, defendan menafikan telah membuat representasi tersebut semasa mesyuarat itu dan mengekalkan bahawa ia menghendaki plaintif dengan segera mengemukakan cadangan untuk bayaran tunggakan bagi balasannya, bagi tujuan mempertimbangkan sama ada untuk meneruskan untuk membekalkan air sejuk kepada bangunan itu. Oleh kerana defendan tidak menerima apa-apa cadangan segera, defendan telah mengemukakan notis penamatannya kepada plaintif. Dalam kes ini, plaintif telah memfailkan saman pemula dan injunksi dan plaintif pada dasarnya memohon deklarasi untuk mendesak defendan meneruskan dengan membekalkan air sejuk kepada bangunan plaintif sepanjang tempoh penerimaan itu. Isu-isu untuk pertimbangan adalah: (a) sama ada air sejuk tersebut terjatuh di bawah s 392(6) dan (7) Akta Syarikat 2016 ('AS 2016'); (b) sama ada terdapat perjanjian kompromi antara pihak-pihak; dan (c) jika terdapat perjanjian kompromi, sama ada ia telah dilanggarai oleh defendan semasa ia mengemukakan notis penamatan.

Diputuskan, menolak permohonan plaintif untuk injunksi dan saman pemula dengan kos RM7,000 dan RM5,00 masing-masingnya:

(1) Ayat dalam s 392(6) dan (7) AS 2016 adalah jelas, yang mana bekalan hanya berkaitan air, elektrik, gas dan telekomunikasi. Seksyen 392(6) dan (7) AS 2016 tidak digubal untuk membenarkan senarai bekalan tanpa had. Subseksyen tersebut patut diberikan maksud biasanya (lihat perenggan 55).

(2) Mahkamah memberi penekanan istilah 'utilities' dan bukan kepada 'essential services' sepertimana dinyatakan oleh plaintif, kerana air, elektrik, gas dan telekomunikasi merupakan kemudahan, bahkan, kemudahan awam. Kemudahan, berdasarkan pemahaman biasanya, adalah produk untuk kegunaan awam, yang mana boleh dihujahkan adalah produk yang mana orang awam tidak boleh hidup tanpanya. Ia adalah penting untuk mana-mana perbadanan menjalankan operasi hariannya. Air sejuk, tidak seperti elektrik, bukan untuk kegunaan awam. Mahkamah tidak berpihak untuk menambah air sejuk kepada semarai bekalan di bawah s 392(6) dan (7) AS 2016. Mahkamah berpendapat bahwa s 392(6) dan (7) AS 2016 mengawal kemudahan awam, dan ia tidak termasuk air sejuk. Defendan dalam skop haknya untuk bergantung kepada peruntukan dalam perjanjian tersebut untuk menamatkan bekalan air sejuk itu, kerana tidak dibayar tunggakan yang ditanggung oleh plaintif (lihat perenggan 42, 45–46 & 58).

(3) Kecuali jika terdapat keterangan yang mendesak untuk mengukuhkan, atau tiada penafian daripada mana-mana pihak, suatu pengataan yang dibuat dalam afidavit masih kekal tidak dibuktikan. Memorandum

A dalam itu menyatakan dengan sendirinya dan tidak memberi apa-apa tambahan kepada versi plaintif. Bahkan, hubungan antara pihak-pihak selepas mesyuarat itu boleh dianggap sebagai menyokong hujah defendan. Mahkamah dengan itu tidak boleh menerima versi plaintif (lihat perenggan 60).]

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Cases referred to

Hari Bhadur Ghale v Public Prosecutor [2012] 6 MLJ 597; [2012] 7 CLJ 789, FC (refd)

C *Kerajaan Negeri Sarawak & Ors v Basnol bin Abol (deceased) & Ors and other appeals* [2003] 1 MLJ 376; [2003] 1 CLJ 253, CA (refd)

Leyland DAF Ltd; Re Ferranti International plc, Re [1994] 4 All ER 300, Ch D (refd)

Revenue and Custom Commissioners v Football League Ltd [2012] EWHC 1372 (Ch), Ch D (distd)

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Legislation referred to

Corporations Act 2001 [AUS] s 600F
Companies Act 1965 (repealed by the Companies Act 2016)
E Companies Act 2016 ss 392(6), (7), 414(7)(a), (7)(b)
Interpretations Acts 1948 and 1967 s 17A
Receiverships Act 1993 [NZ] s 40
Insolvency Act 1986 [UK] ss 233, 233(2), (3), 433(1)

F *Kelvin Seet Wan Nam (Lim Lay Yee with him) (Cheang & Ariff) for the plaintiff. Natalia Izra Nasaruddin (Zul Rafique & Partners) for the defendant.*

Mohamed Zaini Mazlan J:

G INTRODUCTION

[1] The plaintiff's receiver and manager is seeking for a declaration, that will in essence compel the defendant to continue supplying chilled water to the plaintiff's building during the period of receivership.

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[2] This judgment will among others, entail a discussion on s 392(6) and (7) of the Companies Act 2016, namely whether they apply to chilled water.

BRIEF FACTS

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[3] The plaintiff is the owner of a building called 'Menara Ikhlas' in Putrajaya ('the building'). Mr Duar Tuan Kiat was appointed by AmBank Islamic Bhd as the receiver and manager of the building on the 16 November 2017, pursuant to a debenture dated 12 May 2015.

[4] The defendant is the sole supplier of chilled water for all air conditioning systems in the Federal Territory of Putrajaya. It was appointed as the sole supplier by Perbadanan Putrajaya acting on behalf of the Federal Government, through an 'Infrastructure Agreement For The Supply of Chilled Water In Putrajaya' dated 31 December 1998.

[5] The chilled water produced and supplied by the defendant is for the provision of air-conditioning in premises located in Putrajaya. Chilled water is defined as 'the medium required to provide energy for air-conditioning ...' under this agreement.

[6] The defendant had in turn agreed to supply chilled water to the plaintiff's building through an 'Agreement For The Supply Of Chilled Water To Lot 3C7' dated 14 March 2014 ('the agreement'). The terms and condition of this agreement and the services provided are not matters in dispute.

[7] The defendant contended that the plaintiff had breached the agreement, when it failed to pay for the services pursuant to its obligations under the agreement. The plaintiff had at the material time owed payment for the period of March 2017–January 2018, amounting to RM4,171,523.35.

[8] The plaintiff had through its letter dated 14 December 2017, informed the defendant of Mr Duar Tuan Kiat's appointment as a receiver and manager of the building. Both parties then agreed to meet on 4 January 2018, to discuss matters pertaining to the building's operations.

[9] The meeting which was held at the defendant's office was attended by the representatives of the plaintiff's receiver and manager and the defendant. The plaintiff claimed that it was agreed in the meeting, that the defendant will continue supplying chilled water to the building, based on the receiver and manager's assurances that it will pay the charges incurred during the receivership period, and submit a proposal for the arrears incurred pre-receivership by the 26 January 2018.

[10] The plaintiff exhibited an internal memorandum dated 4 January 2018 from the receiver and manager's representative that attended the meeting to Mr Duar Tuan Kiat. The alleged agreement by the defendant's representative was mentioned in this memorandum.

[11] Conversely, the defendant denied making any such representation. The defendant claimed that it had asked the plaintiff to submit its proposal immediately, and not by the 26 January 2018 as alleged. The defendant issued its notice of termination dated 11 January 2018, as it did not receive any immediate proposal from the plaintiff. In this notice, the defendant gave the

plaintiff fourteen days to remedy its default, failing which will result in the defendant ceasing to supply the chilled water.

[12] This led the plaintiff to file this suit together with an interlocutory application for an interim injunction with a certificate of urgency. The application for an injunction was granted ex parte on the 18 January 2018, and fixed for inter parte.

[13] I then decided to hear the injunction application and the originating summons concurrently for expediency. The issues raised moreover are similar.

ISSUES

[14] The plaintiff put forward three issues for consideration, two of which are inextricably linked. The first issue pertains to the determination of s 392(6) and (7) of the Companies Act 2016 ('the CA 2016'), namely, whether the supply of chilled water falls under the category of 'supplies'. The second and third issue are whether there was a compromised agreement between the parties, and if so, whether it had been breached by the defendant when it issued the notice of termination. These issues shall be addressed in turn.

Whether chilled water comes under s 392(6) and (7) of the CA 2016

[15] It is undisputed that the defendant is the sole provider of chilled water to all buildings in the Federal Territory of Putrajaya, including the building. It goes without saying that the defendant has a monopoly over the supply of chilled water, which meant that the plaintiff had no other viable suppliers to turn to. The building's centralised air-conditioning could not function without the chilled water.

[16] It is also undisputed that the plaintiff had through its receiver and manager, given a guarantee to pay for the supply of chilled water to the building during its receivership period. The plaintiff maintained that this undertaking was made to fulfil the conditions under s 392(6) of the CA 2016, which states:

> If a request is made by or with the concurrence of the receiver or receiver and manager for the giving of any of the supplies, including water, electricity, gas and telecommunications, after the appointment of the receiver or receiver and manager, the supplier may make it a condition of the giving of the supply that the receiver or receiver and manager personally guarantees the payment of any charges in respect of the supply given after its appointment.

[17] Consequent to that, the plaintiff maintains that the defendant is therefore prohibited under s 392(7) of the CA 2016, from withholding the supply of chilled water until the arrears incurred pre-receivership are fully paid up.

[18] The ambit of s 392(7) of the CA 2016 is as follows:

> Notwithstanding subsection (6), the supplier shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the appointment of receiver or receiver and manager are paid.

[19] Sections 392(6) and (7) of the CA 2016 are new additions to the Companies Act 2016. The plaintiff highlighted the Corporate Law Reform Committee's report titled 'Review of the Companies Act 1965'. This committee was established by the Companies Commission of Malaysia to review the then Companies Act 1965. The segment highlighted by the plaintiff was under para 4.26 of the report, which states:

> Utility suppliers with monopolistic control such as Tenaga Nasional Berhad (TNB), Telekom, etc. should be obliged to continue to provide supplies to a company with respect to which a judicial management order has been made so long as the new debts incurred are paid. They should not cease supply, or discontinue services on the ground that the 'old debts' are not paid.

[20] The plaintiff admitted that although the recommendations pertained to companies under judicial management, where the relevant sections are s 414(7)(a) and (7)(b) of the CA 2016, it contended that the rationale equally applies to s 392(6) and (7) of the CA 2016, given the similarity between these two sections.

[21] Indeed, save for the paragraphing format, s 392(6) and (7) of the CA 2016 are identically worded. The plaintiff submitted that the committee's rationale under paragraph 4.26 of the report should equally apply to s 392(6) and (7) of the CA 2016.

[22] The plaintiff also highlighted the similarity between s 392(6) and (7) of the CA 2016 with that of s 233(2) of the United Kingdom's Insolvency Act 1986 ('the IA 1986'), which is reproduced below:

> (2) If a request is made by or with the concurrence of the office-holder for the giving, after the effective date, of any of the supplies mentioned in the next subsection, the supplier —
>
> (a) may make it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply, but

A (b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid.

B Office holder is defined as the receiver, liquidator and the likes under s 433(1) of the IA 1986.

[23] The English case of *Revenue and Custom Commissioners v Football League Ltd* [2012] EWHC 1372 (Ch) was referred to, where the court held C that s 233 of the IA 1986 prohibits utility suppliers from requiring payment of arrears incurred pre-administration, as a condition to continue supply.

[24] The Australian Corporations Act 2001 too was cited, where s 600F similarly prohibits suppliers of essential services from refusing to continue D supply, on the basis that the company owes the supplier, before the effective day that the liquidator or administrator was appointed. The section reads as follows:

(1) If:

E (a) a relevant authority of an eligible company requests, or authorises someone else to request, a person or authority (the supplier) to supply an essential service to the company in Australia; and

(b) the company owes an amount to the supplier in respect of the supply of the essential services before the effective day;

F the supplier must not:

(c) refuse to comply with the request for the reason only that amount is owing; or

G (d) make it a condition of the supply of the essential service pursuant to the request that the amount is to be paid.

[25] New Zealand's s 40 of the Receiverships Act 1993 was also referred to, which is as follows:

H 40 Refusal to supply essential services prohibited

(1) For the purposes of this section, an essential service means —

(a) the retail supply of gas;

I (b) the retail supply of electricity;

(c) the supply of water;

(d) telecommunication services.

(2) ...

(3) Notwithstanding the provisions of any other Act or any contract, a supplier of an essential service must not —

(a) refuse to supply the service to a receiver or to the owner of property in receivership by reason of the grantor's default in paying charges due for the service in relation to a period before the date of the appointment of the receiver; or

(b) make it a condition of the further supply of the service to a receiver or to the owner of property in receivership that payment be made of outstanding charges due for the service in relation to a period before the date of the appointment of the receiver; or

(c) [Repealed]

[26] The plaintiff urged this court to give a purposive construction to s 392(6) and (7) of the CA 2016, in that they were designed to prevent a receiver and manager from encountering difficulties in attending to the company's business, by not having the essential services cut off.

[27] The plaintiff referred to s 17A of the Interpretations Acts 1948 and 1967 in support, which states:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[28] The defendant's stand differs. It takes the view that chilled water does not come within the ambit of s 392(6) and (7) of the CA 2016. It maintains that the only suppliers that come under the ambit of that section are those that supplies water, electricity, gas and telecommunication, namely public utility companies.

[29] The defendant contended that s 392(6) and (7) of the CA 2016 regulates the supply of essential services, namely utilities named in the sections concerned. Chilled water, the defendant forcefully submitted, does not come under essential services. To drive home this point, the defendant contended that the plaintiff is at liberty to install or use its own air conditioning units in the building. Chilled water, it submitted, is not an essential and irreplaceable supply, unlike water and electricity for example.

[30] The defendant concluded by submitting, that it is entitled to terminate the supply of the chilled water pursuant to its contractual rights under the agreement, due to the plaintiff's failure to pay the arrears.

The compromised agreement

[31] In gist, the plaintiff claimed that the defendant had through its representatives in the meeting, agreed that it will not cease supply to the building, provided that the receiver and manager agrees to pay for the services incurred, and to be incurred during the receivership period, and that it will submit a proposal to address the outstanding arrears incurred pre-receivership by the 26 January 2018.

[32] The plaintiff then referred to its own internal memorandum dated 4 January 2018, and referred to an excerpt from the memo, which is reproduced below:

> Zac informed that all outstanding amounts owing to GDC should be settled ie regardless whether the amounts relate to pre-receivership or post-receivership period. Lee was amendable (sic) *to our suggestion that we submit a plan on how we intend to settle the outstanding amount owing by BPSB to GDC and assurance/undertaking from R&M for the payment of charges incurred during the receivership period for their consideration. Lee highlighted that in order for GDC to consider providing continued supply to Menara Ikhlas, our proposal must address:*
>
> – full settlement of the outstanding pre-receivership amounts.
>
> – commitment by the R&M to ensure timely settlement of GDC's invoices during the receivership period e.g. Bank guarantee, letter of undertaking or cash deposit etc ...
>
> The above proposal to GDC is to be submitted by 26 January 2018 failing which GDC will take the necessary actions to recover the outstanding amounts and also discontinue supply to Menara Ikhlas.

[33] The plaintiff submitted that the defendant had in breach of this compromised agreement, issued the termination notice dated 11 January 2018, which was before the alleged agreed deadline had passed.

[34] The defendant on the other hand denied making any such representation during the meeting, and maintained that it had required the plaintiff to immediately submit a proposal for payment of the arrears for its consideration, in order to consider whether to continue supplying chilled water to the building.

FINDINGS

Whether chilled water comes under s 392(6) of the CA 2016

[35] I will firstly address the defendant's reliance on the contractual provisions of the agreement to terminate supply due to the plaintiff's failure to pay the arrears. The plaintiff took no issue with the defendant's rights of termination under the agreement, but contended that the statutory

requirements under s 392(6) and (7) of the CA 2016 overrides the defendant's contractual rights. A

[36] That is indeed the case. It was held by the Court of Appeal in *Kerajaan Negeri Sarawak & Ors v Basnol bin Abol (deceased) & Ors and other appeals* [2003] 1 MLJ 376; [2003] 1 CLJ 253 (CA), that statutes override contractual provisions. B

[37] I am of the view that s 392(6) and (7) are to be read disjunctively. Section 392(6) of the CA 2016 provides suppliers with two options. A supplier may elect to continue supplying the supplies mentioned even if there are arrears incurred, or impose a condition, that the receiver and manager provides a personal guarantee to pay any charges before it continues supplying. 'Any charges' denotes future charges, and not arrears incurred prior to the receiver and manager being appointed, as the section refers to supply given after the appointment. C D

[38] On the other hand, s 392(7) of the CA 2016 concerns charges incurred prior to the appointment of the receiver and manager. Here, a supplier is compelled to continue supplying, and is prohibited from making it a condition, that the arrears incurred prior to the appointment of the receiver and manager be paid first. It is apparent that the rationale is to allow a receiver and manager to manage the company without having to worry about future supply. This however does not absolve the company from having to pay the arrears. A debt incurred is still payable. It merely allows the receiver and manager some breathing space to manage the company without much hindrance from the time of his appointment. E F

[39] The live issue however, is whether the defendant is categorised as a supplier within the meaning of s 392(6) and (7) of the CA 2016, and whether chilled water comes under the definition of supply. If this was not the case, the defendant would then be entitled to rely on its contractual rights under the agreement to terminate the chilled water supply. G

[40] I must admit that the plaintiff's argument that the category of supplies named under s 392(6) of the CA 2016, which are water, electricity, gas and telecommunications is not closed, and that it leaves it open to add more supplies such as chilled water, is an attractive proposition. H

[41] However, it has not escaped my attention, that save for gas, the other utilities stated in the section are essential needs of everyday life in this country, and supplied by public utility companies. I

[42] Now I have emphasised the phrase 'utilities' as opposed to 'essential

A services' as favoured by the plaintiff, as water, electricity, gas and telecommunication are utilities, in fact, public utilities. Furthermore, the Corporate Law Reform Committee had in the excerpt of the report referred to by the plaintiff, specifically mentioned 'utility suppliers'.

B **[43]** The plaintiff's attempt to urge this court to give the sections a purposive construction is also equally attractive, as it does make sense that the idea behind s 392(6) and (7) of the CA 2016 is to prevent companies under receivership from encountering difficulties to manage the company successfully. If that was indeed the case, it would open up the definition of supply to a wide category.
C Raw materials are for example, essential supplies to a production or manufacturing companies.

[44] I am however, disinclined to agree with the plaintiff's propositions.

D **[45]** Utilities, by its common understanding, are products that are for public consumption, which arguably are products that the public could not live without. They are crucial for any corporation to carry out their daily operations.

E **[46]** Chilled water, unlike electricity, is not for public consumption at large. I am not inclined to add chilled water to the list of supplies under s 392(6) of the CA 2016. I am of the view that s 392(6) and (7) of the CA 2016 governs public utilities, and that it does not include chilled water.

F **[47]** I accept the fact that air-conditioning is a necessary comfort, particularly in a tropical climate such as ours. The absence of chilled water would no doubt disable the building's air conditioning system. However, as the defendant had rightfully pointed out, the plaintiff is not without a solution, for
G it can install air conditioners or even rent portable ones. Water and electricity on the other hand, cannot be replicated or sourced, other than from the public utility companies that supply them.

[48] I have considered the plaintiff's contention that the defendant has a
H monopoly over the supply of chilled water in Putrajaya. The plaintiff has also attempted to equate the defendant's monopolistic control to that of the utility companies such as Tenaga Nasional. The distinction is this; utility companies such as Tenaga Nasional Bhd provide utilities for the public at large. The chilled water provided by the defendant on the other hand, does not come under this
I category. It is targeted to specific entities. More crucially, it is not mandatory for chilled water to be purchased. The plaintiff has a choice.

[49] I am also not persuaded by the plaintiffs attempt to highlight the similarity between s 392(6) and (7) of the CA 2016 with the UK's s 233 of the

IA 1986. Admittedly the title to s 233 states the supplies of 'gas, water, electricity, etc'. It seems to suggest that there are other supplies that can be considered other than gas, water and electricity.

[50] This is not the case, for s 233(2) specifically states that '*If a request is made by or with the concurrence of the office-holder for the giving, after the effective date, of any of the supplies mentioned in the next subsection* ...'. (Emphasis added.) Section 233(3) states as follows:

> (3) The supplies referred to in subsection (2) are —
>
> (a) a supply of gas by a gas supplier within the meaning of Part I of the Gas Act 1986;
>
> (b) a supply of electricity by an electricity supplier within the meaning of Part I of the Electricity Act 1989;
>
> (c) a supply of water by a water undertaker or, in Scotland, Scottish Water,
>
> (d) a supply of communications services by a provider of a public electronic communications service.

[51] As such, unlike s 392(6) and (7) of the CA 2016, s 233 of the IA 1986 sets out specifically the list of supplies. If we were to draw an analogy, it would mean that the supplies would only involve gas, water, electricity and telecommunications, which I emphasise, are public utilities.

[52] In *Re Leyland DAF Ltd; Re Ferranti International plc* [1994] 4 All ER 300 (at p 311), the court had referred to s 233 of the IA 1986, and specifically held that it concerns public utilities.

[53] Section 600F of the Australian Corporations Act 2001 uses the phrase 'essential services'. Although it does not go on to describe what the essential services are, I take it to mean public utilities too. Similarly, s 40 of the New Zealand Receiverships Act 1993 also uses the phrase 'essential services', except that it had set out what they are, which again are public utilities, namely gas, electricity, water and telecommunication services, similar to s 392(6) of the CA 2016.

[54] The case of *Revenue and Custom Commissioners v Football League Ltd* cited by the plaintiff does not help to further the plaintiff's argument, as the case concerns the supply of electricity.

[55] As for the plaintiff's submission that s 392(6) and (7) of the CA 2016 should be given a purposive approach, I am of the view that the words in the sections are clear, in that the only supplies concerned are water, electricity, gas and telecommunication. It is my judgment that s 392(6) and (7) of the CA

2016 was not drafted to allow the list of supplies stated as non-exhaustive. These sections must be given its plain meaning.

[56] The Federal Court in *Hari Bhadur Ghale v Public Prosecutor* [2012] 6 MLJ 597; [2012] 7 CLJ 789 (FC) expounded on the basic principles of statutory interpretation. One of the principles enunciated is as follows:

> Secondly, where the words are unambiguous, plain and clear they must be given their natural and ordinary meanings. It is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral (see *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; [1981] CLJ Rep 82; *Tan Weng Chiang v Public Prosecutor* [1992] 2 MLJ 625; [1992] 4 CLJ 2094). Further, it should be borne in mind the 'dictum that one should not 'twist and outstretch the language beyond its common usage' (see: *Cheong Seok Leng v Public Prosecutor* [1988] 2 MLJ 481; [1988] 1 LNS 39) (at p 795).

[57] I can appreciate the difficulty that the plaintiff's receiver and manager would face in managing the building's tenants without having air-conditioning. The only solution however, is to expand the list of supplies, or provide a guideline on what constitute supplies under s 392(6) and (7) of the CA 2016. That task lies with the legislative, for the court's duty is to interpret a statute, and not to legislate.

[58] I therefore hold that s 392(6) and (7) of the CA 2016 do not apply to chilled water. The defendant is well within its rights to rely on the provisions in the agreement to terminate the supply of chilled water, for non-payment of the arrears incurred by the plaintiff.

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[59] I am faced with two conflicting versions. On the one hand, the plaintiff claimed that the defendant had given them an assurance to continue supply, provided a proposal is given by the 26 January 2018. The defendant on the other hand, claimed that it wanted the proposal immediately, and that it had never given an assurance to continue supply. The plaintiff in attempting to substantiate its version produced its own internal memorandum.

[60] Unless there are compelling evidences to substantiate, or a lack of denial from the other party, an allegation made in an affidavit remains unproven. The internal memorandum, in my respectful view, is self-serving, and does nothing to add weight to the plaintiff's version. In fact, the correspondence between the parties post-meeting serves to support the defendant's contention. I am therefore unable to accept the plaintiff's version.

CONCLUSION

[61] The plaintiff's application for an injunction and originating summons is therefore dismissed with costs of RM7,000 and RM5,000 respectively.

Plaintiff's application for injunction and originating summons dismissed with costs of RM7,000 and RM5,000 respectively.

Reported by Dzulqarnain Ab Fatar